114-477

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884

No. 1263.

RUDGER CLAWSON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED FEBRUARY 5, 1885.

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a In the Supreme Court, Utah Territory. January Term, 1885.

THE UNITED STATES, Respondent,
vs.
RUDGER CLAWSON, Appellant.

Transcript.

F. S. Richards and Bennett, Harkness & Kirkpatrick, attorneys for appellant.

W. H. Dickson, U. S. district attorney, for respondent.

Filed January 7, 1885. E. T. SPRAGUE, *Clerk.*

1 UNITED STATES OF AMERICA, *Territory of Utah,* } *ss:*

In the Third Judicial District Court of Utah Territory, of the April Term, A. D. 1884, of the District Court in and for said Third Judicial District, held in Salt Lake County, in said Territory.

THE UNITED STATES *vs.* RUDGER CLAWSON.

The grand jurors of the United States of America, good and lawful men, residents of the third judicial district of Utah Territory, legally chosen, selected, and impaneled, sworn, and charged in and for the body of said district, in the name and by the authority of the United States of America, on their oaths do say, find, and present: That Rudger Clawson, late of the said district, on, to wit, the first day of August, A. D. 1882, at the city of Salt Lake, in the county of Salt Lake, in the Territory of Utah, did marry and take wife one Florence Ann Dinwoodey, spinster, and her, the said Florence Ann Dinwoodey, then and there had for his wife, from whom the said Rudger Clawson has never been divorced, and that she, the said Florence Ann, ever since the day and year last aforesaid has been and still is the lawful wife of him, the said Rudger Clawson; and that the said Rudger Clawson, after the date last aforesaid, and whilst he was so married to the said Florence Ann as aforesaid,
to wit, on the first day of June, A. D. 1883, at the city of
2 Salt Lake, in the county of Salt Lake, in the Territory of
Utah, unlawfully and feloniously did marry and take to wife one Lydia Spencer, and to her, the said Lydia Spencer, was then and there unlawfully and feloniously married, the said Florence Ann, his said former wife, being then alive; and so the grand jurors aforesaid do charge him, the said Rudger Clawson, with the crime of polygamy, committed in manner and form as aforesaid, contrary to the form of the statute of the United States of America, in such case made and provided, and against the peace and dignity of the said United States; and the grand jurors aforesaid, on their oaths aforesaid, do further say, find, and present, that the said Rudger Clawson, late of said district, on, to wit, the first day of June, A. D. 1883, and on divers other days, and continuously between the first day of Jane, A. D. 1883, and the 17th day of April, A. D. 1884, at the city of Salt Lake, in the county of Salt Lake, in the Territory of Utah, and

within the jurisdiction of this court, did unlawfully live and cohabit with more than one woman, to wit, with one Florence Ann Clawson and one Lydia Spencer, and that the said Rudger Clawson, during the time aforesaid, did unlawfully claim and treat said two women as wives of him, the said Rudger Clawson, contrary to the statutes of the United States in such case made and provided, and against the peace and dignity of the said United States.

JOHN TIERNAN,
Foreman of the Grand Jury.

W. H. DICKSON,
U. S. Attorney.

Endorsed: Title of court and cause. Indictment for polygamy and unlawful cohabitation. A true bill. John Tiernan, foreman of the grand jury. Presented in open court by the foreman of grand jury in the presence of the grand jury, and filed by me the 24th day of April, A. D. 1884. O. J. Averill, clerk, by H. G. McMillan, deputy clerk. Witnesses: Horace G. Whitney, Henry T. McEwan, Alice
Dinwoodey, Henry Dinwoodey, Annie Dinwoodey, Heber M.
3 Wells, John D. Spencer, Sidney B. Clawson, P. H. Lannan,
S. H. Farnsworth, Florence Clawson, Stanley H. Clawson, Hyrum B. Clawson, Lydia Spencer, Mrs. Jane C. S. Auer, Aldrich Auer, Alice E. Taysum.

1884, April 24, issued warrant.
1884, April 26, filed motion to quash.
1884, April 25, filed warrant.
1884, October 4, defendant arraigned; plea, not guilty.
1884, October 16, jury trial in progress.
1884, October 21, mistrial, jury can't agree, discharged.
1884, October 22, jury being impanelled.
1884, October 24, jury being impanelled, and last sworn.
1884, October 25, filed verdict guilty on both counts.
Judgment fixed, November 3rd, 1884.
1884, November 3, defendant sentenced, first count, pay fine $500 and 36 months; second count, $300 and 6 months.
1884, November 3, filed bill of exceptions.

Indictment for Polygamy and Unlawful Cohabitation.

(Title.)

On this day the defendant, Rudger Clawson, is arraigned at the bar in open court, in due form of law, and pleads to said indictment not guilty.

October 4, 1884.

Polygamy, etc.

(Title.)

We, the jury impanelled in the above case, find the defendant, Rudger Clawson, guilty on both counts of the indictment as charged in the indictment.

October 25, 1884.

W. H. H. BOWERS, *Foreman.*

4 Endorsed: Title of court and cause. Verdict. Filed October 25, 1884. J. M. Zane, clerk, by H. G. McMillan, deputy clerk.

Polygamy and Unlawful Cohabitation.

(Title.)

This being the time fixed by the court for passing its sentence herein, and the defendant with his counsel, Messrs. Bennett, Harkness & Kirkpatrick, being present, and having filed no motion for a new trial, and declining to move for a new trial, and the defendant being requested to state if there be any reason why the sentence of the court should not be passed upon him, and no cause being shown for the stay of sentence, it is by the court ordered, adjudged, and decreed that you, Rudger Clawson, upon the first count of the indictment and the conviction had for polygamy, do forfeit and pay to the United States the sum of five hundred (500) dollars, and that you be confined and imprisoned in the Utah penitentiary upon said first count for the term of three (3) years and six (6) months; and it is further adjudged and decreed that pursuant to the conviction had under the second count of the indictment against you, the defendant Rudger Clawson, for the crime of unlawful cohabitation, that you do forfeit and pay to the United States the further sum of three hundred (300) dollars, and further that you, the said defendant, be confined and imprisoned in the Utah penitentiary the further term of six (6) months, and it is further adjudged and decreed that you, the said Rudger Clawson, be detained and confined by the officer in charge of said penitentiary until the above imposed fines be paid and satisfied.

November 3d, 1884.

(Title.)

Notice is given that the defendant, Rudger Clawson, appeals
5 to the supreme court of Utah Territory from the judgment
of final conviction made and entered herein on the third day of November, 1884, the said judgment being on both counts of the indictment, one count being for polygamy and one for unlawful cohabitation, and the appeal is from the entire judgment on both said counts.

Dated November 3, 1884.

RUDGER CLAWSON,
By F. S. RICHARDS AND
BENNETT, HARKNESS & KIRKPATRICK,
His Attorneys.

Endorsed: Title of court and cause. Notice of appeal. Service of a copy admitted November 3rd, 1884. W. H. Dickson, U. S. attorney. Filed November 3rd, 1884. J. M. Zane, clerk, by H. G. McMillan, deputy clerk.

(Title.)

The defendant, Rudger Clawson, having been convicted on both counts of the indictment herein, and final judgment having been entered against him on the 3rd day of November, A. D. 1884, and he having appealed to the supreme court of Utah Territory from the whole of said judgment, I do hereby certify that in my opinion there is probable and probably cause for the said appeal.

Dated November 3rd, 1884.

C. S. ZANE,
Judge of the District Court, Third Judicial District, Utah.

Endorsed: Title of court of cause. Certificate of probable cause. Filed November 3rd, 1884. J. M. Zane, clerk, by H. G. McMillan, deputy clerk.

6 *Bill of Exceptions.*

(Title.)

Be it known that after the finding and return of the indictment herein the said defendant, before plea, and on the 30th day of April, 1884, filed in said court his motion to quash and set aside said indictment, as follows:

(Title.)

And now comes the defendant, Rudger Clawson, who was not held to answer herein before the finding of the indictment, and before any plea or proceeding on his part, moves the court to set aside and quash the indictment herein, on the following grounds:

Said indictment was not found or presented by any legally constituted grand jury.

The supposed grand jury which found and presented the indictment was not selected, or drawn, or empanelled as provided by law.

That twenty-nine persons were drawn and summoned from which to empanel a grand jury, and fifteen of them, each of whom was a qualified grand juror, were illegally excluded from said grand jury on the challenge of the prosecuting attorney.

That the names of five of the grand jurors who found and presented said indictment were drawn from the general jury list for the year 1884 without any notice of said drawing as required by law, and said five jurors were placed on said grand jury contrary to law.

That the grand jury which found and presented said indictment was composed of only ten persons drawn from the jury list as required by law.

That by the order of the court the names of thirty persons were first drawn, and afterwards the names of ten more persons were drawn, from the general jury list, to constitute a grand jury, when by law a grand jury must be composed of only fifteen men.

7 This motion is made upon the indictment, the record of the court in the proceeding, and the statement of facts filed herewith.

Dated April 30th, 1884.

F. S. RICHARDS,
Attorney for Defendant.

On the same day the defendant filed in said court and with said motion and in support thereof the following statement of facts:

Statement of Facts Accompanying the Annexed Motion.

(Title.)

A jury list of two hundred persons from which to draw grand and petit jurors for said third district court for the year 1884, was made, certified and filed in the office of the clerk of the court under the provisions of the act of Congress approved June 23d, 1874, and a number was set opposite to each name; those having even numbers opposite to their names were selected by the probate judge and are reputed Mormons, and those having odd numbers opposite to their names were selected by the clerk of this court and are reputed non-Mormons.

On the 31st day of March, 1884, a session of said court was held, pursuant to notice, and in pursuance of a previous order of the court thirty names were drawn from said jury list, from which to impanel a grand jury for the April term, 1884, the names and numbers being as follows:

	172	Richard A. Ballantyne.	110	George H. Snell.
	61	S. Brisacher.	51	John Nickles.
	21	Matthew Cullen.	190	Heber Bennion.
	74	John G. Midgley.	131	Robert W. Davis.
	150	James Russell.	191	W. H. Sells.
	182	John A. Egbert.	104	Joseph A. Jennings.
	143	Lucien Simons.	146	Duncan Park.
8	59	A. T. Manning.	68	James Colt.
	196	John T. Evans.	177	George W. Edgington.
	42	Edwin Pettit.	13	J. M. Darling.
	54	Addison Everett.	125	Charles Brink.
	4	Mathias Nelson.	178	Thomas Mumford.
	142	Albert C. Boyle.	102	John F. Miller.
	89	I. A. Trimble.	48	James Dinwoodey.
	185	James T. Lees.	181	James W. Campbell.

A venire was issued and all said named persons, except Heber Bennion, summoned to appear at said court on the 14th day of April, 1884, at 10 o'clock a. m., and at 2 o'clock p. m. of that day all except Heber Bennion appeared, and the court proceeded to impanel a grand jury for said term. James Dinwoody and Charles Brink, who were not citizens of the United States, and John Nickles and S. Brisacher, who could not read or write the English language, were excused, leaving 25 persons who were drawn as aforesaid.

The said twenty-five persons, during the proceedings to impanel the said grand jury, were all called and sworn and examined as to their qualifications as grand jurors.

Fiften of said persons during said examination were each asked the following questions:

Do you believe in the doctrine and tenets of the Mormon church?

Do you believe in the doctrine of plural marriage as taught by the Mormon church?

Do you believe it is right for a man to have more than one undivorced wife living at the same time?

Each of the persons so interrogated answered the questions affirmatively; each was thereupon challenged by the prosecuting attorney, and the court allowed the challenges, and excluded each of said fifteen persons from the grand jury.

The persons so interrogated had all the qualifications prescribed by law for grand jurors, unless disqualified by said answers.

The following are the names and the numbers of the persons so interrogated and excluded:

9

4	Matthias Nelson.	102	John F. Miller.
142	Albert C. Boyle.	178	Thomas Mumford.
54	Addison Everett.	42	Edward Pettit.
196	John T. Evans.	68	James Coult.
146	Duncan Park.	104	Joseph A. Jennings.
182	John A. Egbert.	150	James Russell.
74	John G. Midgley.	110	George H. Snell.
172	Richard A. Ballantyne.		

The defendant, Rudger Clawson, had not been charged with or held to answer the offense charged in the indictment, or any criminal offense, at the time said grand jury was impaneled, and the examination of the persons called as grand jurors, and the challenges, were wholly conducted and made by the prosecuting attorney, and no questions were propounded to or answered by persons with odd numbers opposite their names respecting their religious belief.

After excluding said fifteen persons, only ten grand jurors accepted by the prosecution remained out of the list of thirty originally drawn; and thereupon the court ordered a drawing by ten additional names from the general list of 200 returned by the probate judge and clerk of the court for the year 1884, and without any other or further notice ten additional names were drawn, as follows:

83	John Tiernan.	11	J. H. Winslow.
194	Anthony Cockrell.	65	John F. Hardy.
197	Amos Feutstermacher.	45	George A. Luke.
27	Joseph Marion.	84	Wm. C. Morris.
2	Thomas L. Burridge.	139	Richard Grant.

And a venire was issued requiring them to appear on the 15th day of April, 1884, at 10 o'clock a. m. On the 15th of April, 1884, the venire was returned served on all of said ten persons except 194 Anthony Cockrell, 179 Amos Feustermocher, and 2 Thomas L. Burridge, who did not appear, and No. 84 Wm. C. Morris, being reported sick, did not appear.

10 The impaneling of the grand jury was proceeded with and concluded, and as impaneled and sworn consisted of the following persons:

83	John Tiernan.	181	James W. Campbell.

177	George W. Edgington.
89	J. A. Trimble.
59	A. T. Manning.
191	W. H. Sells.
21	Matthew Cullen.
65	John F. Hardy.
139	Richard Grant.
185	James F. Lees.
13	J. M. Darling.
143	Lucien Simons.
131	Robert W. Davis.
11	J. H. Winslow.
27	Joseph Marion.

And the said grand jury, composed of the persons last aforesaid and selected and impaneled as aforesaid, is the same grand jury which found and presented the indictment herein.

The foregoing facts are agreed to as correct, and may be taken as true without further proof.

Dated April 30th, 1884.

W. H. DICKSON,
U. S. Dist. Attorney.
F. S. RICHARDS,
Attorney for Defendant.

After argument, the said motion to set aside and quash the indictment was overruled by the court on the 3d day of October, 1884, and to said ruling and decision of the court the said defendant then duly excepted.

Afterwards, at the September term of said court, to wit, on the 21st day of October, A. D. 1884, after a plea of not guilty by the defendant, the issue came on for trial.

In impaneling the jury six persons called were excused on the ground that they sat as jurors on a previous trial of the same case. When twelve persons had been called (exclusive of those excused as aforesaid) and sworn to answer questions respecting their qualifications, the defendant, by counsel, waived the examination and passed the jury as to challenges for cause.

11 The prosecuting attorney then examined George M. Turpin, one of said twelve persons, as follows:

Q. Do you believe that it is right for a man to have living and undivorced more than one wife at the same time?

A. Yes, sir.

Thereupon the counsel for the prosecution challenged the said George M. Turpin for cause. The defendant by counsel denied the challenge, and the challenge was sustained by the court, and the said George M. Turpin was directed by the court to retire and did retire from the jury box. The defendant by counsel then and there excepted to the ruling and decision of the court in sustaining said challenge and excluding said Turpin as a juror.

Counsel for the prosecution then successively challenged for cause. other of said twelve persons so drawn, to wit: Geo. E. Hill, Wm. C. Winder, Ormus E. Bates, George W. Earl, David Archibald, C. C, Asmussen, George Hardman, and Benjamin Green, having first examined each and put to each the same question put to said George M. Turpin, and receive by each the same answer given by said

Turpin, and in each case the defendant by counsel denied the challenge, and the court sustained each challenge, and each of said persons was excluded from the jury; and to each of said rulings and decisions the defendant by counsel then and there excepted.

Counsel for prosecution propounded to Silas Pack and Louis Oviatt, two of said twelve persons, severally the same question pronounced to George M. Turpin, and each of said persons declined to answer, whereupon the prosecuting attorney challenged each successively for cause; the defendant by counsel denied each challenge, and the court sustained the challenges; and to each ruling on said challenges, and the exclusion of said persons as jurors, the defendant excepted.

Three other persons were then called, when it appeared the list of jurors drawn and summoned for the term, and also the general jury list for the year, consisting of 200 names selected and returned for a general jury list, were exhausted, and no names remained in the general jury box.

12 Thereupon the prosecuting attorney, on the ground that the jury list provided for by statute was exhausted, moved the court that an open venire should issue to summon such jurors as were necessary.

The defendant by counsel objected to the issuance of an open venire or any venire for jurors, on the ground that there was no law authorizing it.

The court overruled the objection, and to the ruling the defendant excepted.

Thereupon, under the order of the court, a venire was issued to the United States marshal for Utah, commanding him to summon from the body of the judicial district fifty jurors to appear at the opening of the court on the morning of the 23rd of October, 1884, and the court adjourned until 10 o'clock a. m. of that day.

At the opening of the court at 10 a. m. on said 23rd day of October the U. S. marshal returned said venire, showing he had summoned thereon the persons named in the following challenge, and the defendant thereupon made the following challenge; to wit:

(Title.)

The defendant, Rudger Clawson, before a juror herein is sworn, challenges the panel of jurors called and returned to try the case, on the ground that there has been a material departure from the forms prescribed by law, in respect to the drawing and return of said jurors, in this:

The names of J. T. Beers, B. C. Harvey, Chas. Connor, R. McIntosh, H. Collins, C. J. Carman, H. Denhalter, John Knapp, A. Podlech, A. C. Brixon, J. B. Griffin, P. E. Fitzgerald, W. H. H. Bowers, George Decker, Wm. Clays, Jas. Fowles, M. Thomas, M. H. Brisacker, L. Ordner, Jas. Sherlock, Wm. Bredmeyer, Jas. Fitzgerald, J. G. Davis, W. C. Dunbar, Jr., R. Alf. S. Levy, Thos. Carter, Jas. Clasby, Thos. Dimond, S. E. Ewing, J. H. Burton, Wm. McCrea, Jas. Ashman, E. B. Wilder, M. McKimmins, J. D. C. Glanfield, S. J. Nathan, Phil. Klipple, Boyd Park, W. L. Pick-

ard, John Cunnington, Gustav Schultz, Ed. Michalis, J. C.
13 Conklin, F. B. Peas, S. Honak, Chas. Aumond, Chas. Barnett,
Al. Guivits, and A. G. Paddock, called and on said panel, were not, nor was the name of either of said persons, on the jury list of two hundred names for the year 1884, nor put in the jury box, nor drawn therefrom; but that each of said persons was selected and summoned by the United States marshal for Utah Territory, on an open venire issued from this court contrary to law; and for further reason that said persons have not been summoned from the *the* body of the third judicial district of Utah Territory, but all of said persons were summoned in Salt Lake City, and they are all residents of Salt Lake county, except J. T. Beers and Jas. Fowles, and that none of said persons are residents of either Tooele or Davis counties in this district.

Dated October 23rd, 1884.

RUDGER CLAWSON,

E. A. Ireland, U. S. marshal for Utah, was then sworn and testified that the list of names summoned on the venire was made in his office, most of the names being given by himself, the others by his deputies, and notices for the persons named were made in his office. That the service was made by his deputy, Greenman. That no special instructions were given to the deputies as to service, only to find the persons and serve them. That he was not present at the service, but understood all the services were made in Salt Lake City. That the services were made in Salt Lake City, but he understood some of them did not reside in the city.

The witness then looked over the list of names summoned, and said J. T. Beers resides in Summit county and was served here.

That he did not know seventeen of the persons named, and recognized the remainder as residents of Salt Lake City, and that all the names he knew were of persons residing in the city, except Beers.

J. W. Greenman, U. S. deputy marshal, testified that he served
some of the persons named, and on going through the list rec-
14 ognized all as residents of Salt Lake City, except the follow-
ing: J. T. Beers, who resides at Park City, Summit county, in this district; Charles Connor and J. B. Griffin, who resides in Bingham, Salt Lake county; P. E. Fitzgerald, who resides at Alta, Salt Lake county; Jas. Fowles, who sometimes resides in Summit county and sometimes in this county; and Charles Bartlett, who resides in Bingham, Salt Lake county. None of the jurors were summoned from the bystanders.

The matter of the challenge was then submitted, and the challenge was overruled by the court; and to said ruling and decision the defendant by counsel then and there excepted.

J. T. Beers, one of the persons summoned on the open venire, was examined on his *voir dire*, and in answer to counsel for the defendant said:

I reside in Park City, Summit county, and I have heard of this case. I have not formed an unqualified opinion or belief as to the guilt or innocence of the defendant. I have heard what purported to be the facts in the case, and I have formed an opinion in regard to the guilt or innocence of the defendant. I have expressed an opinion. It is such an opinion that it would require evidence to modify or remove it.

The defendant, by counsel, here challenged the juror for implied bias.

Examined by prosecution. I am really a druggist, but am mining principally, in Park City, and have lived in the Territory since 1877, and been mining about five years. I have been in this city a week, and during that time have read the newspapers. I always read them. Have read them from day to day. I have not read but certain portions of the editorials. I have not read what purported to be given in the papers.

(During the previous week a trial of this case occurred in the same court and the newspapers of Salt Lake City gave what purported to be the evidence from day to day, with editorial comments.)

I have not heard from any other source what purported to be the
facts of the case. I can't say that the opinion I have, or may
15 have, expressed depends entirely on what I have read in the
newspapers. I believe the defendant here to be a polygamist.

(By the COURT: You must not state what your opinion is, that is not proper for a juror.)

I have not heard from any person what purported to be the facts of the case. I have not read what purported to be a statement of the evidence or facts, but I have read editorial comments in some of the papers. No one has told me anything about the case. I have heard it discussed more than once generally. In the discussions there was no statement what the evidence of facts were, nothing of that kind, and I have no statement of fact which I believe in my own mind to found an opinion on. My opinion is general and not particularly directed toward this case, but generally toward that class of cases, and is not an unqualified opinion, and I understand perfectly the distinction between a qualified and unqualified opinion. In no sense did I intend to be understood as having an unqualified opinion. I think as a juror I could act impartially and decide upon the sworn evidence. I think I could perform that duty without reference to any feeling as to this class of offenses. I have no prejudice or bias against this defendant, and don't know him.

Challenge denied by prosecution.

To the court:

I stated that I had formed an unqualified opinion as to the guilt or innocence of the defendant. I mean the opinion in general. It is not a fixed opinion. Evidence could remove it. My opinion is not a fixed one, it is a general one.

To counsel for prosecution:

Most assuredly my opinion would readily yield to the sworn evidence in the case. My opinion would yield to the evidence if the evidence differed from what I have heard, it is not based on facts. My opinion was not as to this particular case, but as to cases of polygamy in general.

The court then overruled the challenge, and to the ruling the defendant, by counsel, then and there excepted.

16 The defendant then challenged the juror for actual bias, and rested the challenge on the evidence already taken.

Counsel for the prosecution further examined the juror, who said:

I know nothing about this particular case. The bias or opinion I have is against polygamy cases generally. I know nothing at all as to whether the defendant is guilty or has taken a second wife. I have heard it generally talked about on the street, but not what purported to be the fact of the matter. I have not read what purported to be the evidence in the case, but have read editorial comment on it, and my opinion does not go as to the guilt or innocence of the defendant, and it is directed to a class of men rather than the defendant. I have sat on juries and am aware that the verdict ought to depend on the evidence. My prejudice or bias is against the offense. I don't know the defendant. I have no impression or opinion that would influence me in the jury box as against this man.

Challenge denied by prosecution.

Examined by counsel for defendant:

I said I had heard something of this on the street. I heard some conversation in the Wasatch drug store last night. The substance of it was the case was brought up again. I have been around on the streets and could not help hearing it discussed at other places. I heard parties join in the conversation at the hotel. I cannot fix any other place where I could repeat what was said. At the drug store I only heard the case was up again, that an open venire was out, and they were summoning witnesses. That was about all. I endeavored to make myself absent. Nothing was said in regard to the last jury, or in regard to what had been testified to or not testified to. I don't think I asked or answered a question. I did not read the testimony in the papers, it is too tedious. I cannot say I read any of it, any person's testimony. I remember the names of the witnesses John Taylor, Angus Cannon, because I think the column was headed by that. I saw the headings, that was sufficient for me, and I did not care to read anything further. I certainly would require evidence to remove the impression I have, however
17 slight my knowledge would be. I think I expressed an opinion to Mr. Neldon this morning, I don't know. It was just before I came here to the court-room.

To the court:

It was after I was summoned as a juror.

Q. Did you express the opinion because you had one, or simply because you wanted to get off the jury?

A. I was a little partial. I have other business to attend to. I answer under oath that I could give this case a fair and impartial trial and be governed by the evidence alone.

Challenge overruled by the court, and to the ruling the defendant by counsel then and there excepted.

The defendant challenged the juror J. T. Beers peremptorily.

J. J. Farrell, P. E. Fitzgerald, and Charles Connor were then sworn as jurors, and before the swearing P. E. Fitzgerald and Charles Connor each was challenged separately on the grounds stated in the challenge to the panel aforesaid, and the defendant by counsel objected to the swearing of each as a juror; the court overruled the challenges and objections, and the said jurors were sworn; and defendant by counsel excepted to each of said rulings.

H. Denhalter and Charles Barnett were (among others) called and examined as to their qualifications, and defendant by counsel, before the juror H. Denhalter was sworn as a juror, filed the following challenge.

(Title.)

The defendant, Rudger Clawson, challenges H. Denhalter, one of the persons selected as a juror herein, before he is sworn, for the cause, in this: The said H. Denhalter was selected, summoned, and returned by the United States marshal for Utah Territory, on a special open venire, issued in this action, and the name of said H. Denhalter was not on the list of two hundred jurors for the year 1884, or put in the jury box, or drawn therefrom; and the said H. Denhalter is disqualified to serve as a juror in any case in this
18 court, and he is also disqualified from serving as a juror in this case.

Dated October 23d, 1884.

RUDGER CLAWSON.

Counsel for prosecution objected; that the challenge was too late, the defendant having examined and passed the juror for cause, and the counsel for the prosecution having also examined and passed the juror for cause.

The court sustained the objection and overruled the challenge, and the defendant by counsel then and there excepted to the ruling.

Charles Barnett was called as a juror and examined by both sides as to his qualifications, and before he was sworn as a juror the defendant filed a written challenge, the same (except as to name) as to the juror Denhalter, when the same objection, ruling and exception were made as in the case of said Denhalter.

A full jury not being obtained from the names summoned, a second open venire, returnable on the 25th of October, 1884, was issued to the United States marshal for Utah on the evening of the 23d of October, 1884, for 30 additional persons, and also a third open venire for 24 additional persons, returnable forthwith, to be selected and summoned on said venires by said marshal, was issued on the evening of the 23d. On the morning of the 24th of October the last venire was returned, and counsel for defendant objected to placing the names in the box or drawing any of them until the second venire was returned and the names summoned thereon drawn and exhausted, the second venire not having been returned.

The objection was overruled, and counsel for defendant excepted.

Counsel for defendant then objected to the names summoned on the third open venire being put into the jury box, or drawn, or sworn, and filed the following written challenge to all said persons:

(Title.)

19 The defendant, Rudger Clawson, before any of the following named jurors are sworn, challenges the panel of jurors called and returned to try the case, on the ground that there has been a material departure from the forms prescribed by law, in respect to the drawing and return of said jurors, in this:

That the names of John McTierney, M. C. Phillips, C. E. Wallin, John Bastian, J. L. Dickenson, C. T. Stephenson, Wm. Showell, A. Bechtol, Otto Soloman, J. F. Stayten, Louis Farnsworth, Hiram Kimball, Fred. R. Madeira, J. M. Richardson, James Glendenning, Jas. Anderson, Thos. Smith, George Harkins, Robt. Mulhall, Jos. Ferron, W. A. Pitt, J. G. Williams, J. W. Mason, and Wm. E. Jacobs, called and on said panel, were not, nor was the name of either of said persons, on the jury list of two hundred names for the year 1884, nor put in the jury box, nor drawn therefrom; but that each of said persons was selected and summoned by the United States marshal for Utah on a special open venire issued from this court contrary to the law; and for the further reason that said persons have not been summoned from the body of the third judicial district of Utah Territory; and for the further reason that each and all of said persons on said panel called and returned were selected and summoned by the United States marshal for Utah on a third special open venire, while the second special open venire issued herein by the court was still out and unreturned.

Dated October 24, 1884.

RUDGER CLAWSON.

E. A. Ireland, United States marshal, and his deputy, J. H. Greenman, were severally sworn as witnesses on said challenge, and testified in substance that all the persons summoned on said venire were residents of and summoned in Salt Lake City, and were in the city after the court adjourned the previous evening, and that they did not know whether or not any of the persons had been in the courtroom during the day, but that none was summoned from bystanders. The challenge was overruled by the court, and to the ruling the defendant by counsel then and there excepted. 20

When the juror, J. B. Griffin, was called, defendant by counsel objected to his being sworn on his *voir dire* or otherwise, on the grounds stated in the written challenge afterward filed, and hereinafter set forth, and during the examination of said juror by counsel for the defendant as to his qualifications, said counsel filed the following written challenge to said juror, to wit:

(Title.)

The defendant, Rudger Clawson, challenges J. B. Griffin, one of the persons selected as a juror herein, before he is sworn for the cause, in this:

The said J. B. Griffin was selected, summoned, and returned by the United States marshal for Utah Territory on a special open venire issued in this action, and the name of said J. B. Griffin was not on the list of two hundred jurors for the year 1884, or put in the jury box, or drawn therefrom, and the said J. B. Griffin is disqualified to serve as a juror in any case in this court, and he is also disqualified from serving as a juror in this case.

(Signed) RUDGER CLAWSON.

The court overruled the objection and challenge, and allowed the said juror to be examined on his *voir dire*, and for cause, and sworn as a juror in the case, and to each of said rulings the defendant, by counsel, excepted.

The same proceedings, objections, and challenge were had in the case of each of the following jurors as in the case of J. B. Griffin, to wit, in the case of John Knap, Wm. H. H. Bowers, E. B. Wilder, A. Bechtol, J. W. Mason, and Thomas Smith, and in each of said cases the rulings and exceptions were the same as in the case of the juror J. B. Griffin.

Before all the jurors were sworn the defendant peremptorily challenged W. H. H. Bowers, who had been sworn in chief, and the counsel for the prosecution objected to the challenge on that ground.

21 The court sustained the objection, and the defendant excepted to the ruling. This was defendant's last peremptory challenge, and it was not used or exhausted, except by this challenge to said Bowers.

Before all the jurors selected to try the case were sworn the defendant filed the following written challenge to the twelve, to wit:

(Title.)

The defendant, Rudger Clawson, before the jury herein is sworn, challenges the panel of jurors called to try the case, on the ground that there has been a material departure from the forms prescribed by law in respect to the drawing and return of said jurors, in this: That the names of J. J. Farrell, P. E. Fitzgerald, Charles Conner, Chas. Barnett, Henry Denhalter, J. B. Griffin, John Knapp, W. H. H. Bowers, E. B. Wilder, A. Bechtol, J. W. Mason, and Thomas Smith, called and on said panel, were not, nor was the name of either of said persons, on the jury list of two hundred names for the year 1884, nor put in the jury box or drawn therefrom, but that each of said persons was selected and summoned by the United States marshal for Utah Territory on an open venire issued from this court contrary to law.

(Signed) RUDGER CLAWSON.

The court overruled the challenge, and the defendant by counsel then and there excepted.

The persons named in the last foregoing challenge composed the jury who were sworn and sat as triers in the case, and all of said jurors except J. J. Farrell were summoned on the first and third open venires issued as aforesaid by the United States marshal, and their names were not on the jury list of 200 jurors selected as provided by law. The second open venire was not returned until after the selection and impaneling of the jury.

The prosecution then gave evidence tending to prove the issue on its part. No evidence was offered by the defendant, and the jury, after receiving instructions from the judge, retired, and afterward returned into court and rendered a verdict against the defendant of guilty on both counts of the indictment.

22 And because the exceptions aforesaid do not appear of record herein, the defendant prays they may be settled and made part of the record.

F. S. RICHARDS AND
BENNETT, HARKNESS & KIRKPATRICK,
Attorneys for Defendant.

Agreed to.

W. H. DICKSON,
U. S. District Attorney.

The foregoing bill of exceptions having been agreed to by counsel for the parties, is now allowed and settled, and is correct, and hereby made part of the record herein.

Dated November 3d, 1884.

C. S. ZANE,
Judge of the Third Dist. Court, Utah Territory.

Endorsed: Title of court and cause. Bill of exceptions. Filed November 3d, 1884. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

TERRITORY OF UTAH, }
County of Salt Lake, } *ss:*

I, John M. Zane, clerk of the third judicial district court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original indictment, plea of defendant, verdict of jury, sentence of the court, notice of appeal, certificate of probable cause for appeal, and bill of exceptions in the above-entitled action filed in my office.

Witness my hand and the seal of said court, at Salt Lake City, this 27th day of December, A. D. 1884.

[SEAL.]
J. M. ZANE, *Clerk,*
By H. G. McMILLAN, *Deputy Clerk.*

We certify the foregoing is a full, true, and correct transcript in this cause.

Dated January 7th 1885.

C. S. VARIAN, *Assist. Dist. Att'y*
BENNETT, HARKNESS & KIRKPATRICK,
Att'ys for Appellants.

23 TUESDAY, *January* 20, A. D. 1885.

A session of the supreme court of Utah Territory was held this day, beginning at 10 o'clock a. m., pursuant to adjournment.

Present and presiding: The Hon. Charles S. Zane, chief justice; present, also, the Hon. Philip H. Emerson, associate justice, the Hon. Stephen P. Twiss, associate justice, the clerk, marshal, and members of the bar.

Court was duly opened.

* * * * * * *

From 3d District.

UNITED STATES, Respondent, *vs.* RUDGER CLAWSON, Appellant.

This cause coming on regularly for hearing, was argued by Mr. Bennett, for appellant, Mr. Varian, for respondent, submitted, and taken under advisement.

24 FRIDAY, *January 23d*, A. D. 1885.

A session of the supreme court of Utah Territory was held this day, beginning at 10 o'clock a. m., pursuant to adjournment.

Present and presiding: The Hon. Charles S. Zane, chief justice; present, also, the Hon. P. H. Emerson, associate justice, and the Hon. Stephen P. Twiss, associate justice, the clerk, marshal, and members of the bar.

Court was duly opened.

* * * * * * * *

From 3d District.

THE UNITED STATES, Respondent, *vs.* RUDGER CLAWSON, Appellant.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged, Emerson, J., expressing no opinion therein, that the judgment and sentence of the district court therein be, and the same is hereby, affirmed.

25 Supreme Court, Utah Territory.

THE UNITED STATES, Respondent, *vs.* RUDGER CLAWSON, Appellant.

The appellant assigns errors on the record herein as follows:

1. The district court erred in overruling the appellant's motion to set aside the indictment, and the supreme court of Utah Territory erred in affirming the judgment and ruling of the district court in this respect.
2. The district court erred in overruling the appellant's challenges to the panel of petit jurors, and the supreme court of the Territory erred in affirming the legality of the ruling.
3. The district court erred in overruling the appellant's challenge to individual jurors summoned on special open venire, and the supreme court of the Territory erred in affirming the ruling, and a conviction by a jury selected and summoned on open special venire.
4. The district court erred in overruling the appellant's peremp-

tory challenge to the juror W. H. H. Bowers, and the supreme court of the Territory erred in affirming the ruling.

26 5. The district court erred in overruling the appellant's challenge to the list of jurors selected to try his case, and the supreme court of Utah erred in sustaining the ruling.

6. The district court erred in holding the appellant could lawfully be tried by a jury most of whom were selected & summoned on open special venire and not in accordance with the act of Congress, and the supreme court of the Territory erred in affirming a conviction by a jury so constituted.

F. S. RICHARDS AND
BENNETT, HARKNESS & KIRKPATRICK,
Attornies for Appellant.

[Endorsed:] Supreme court, Utah Territory. The United States *vs.* Rudger Clawson. Assignment of errors. Filed 26th January, 1885. E. T. Sprague, clerk.

27 UTAH TERRITORY:

In the Supreme Court.

THE UNITED STATES, Respondent, *vs.* RUDGER CLAWSON, Appellant.

At the last September term of the third judicial district court the appellant was tried on an indictment containing two counts. The first charged polygamy and the second unlawful cohabitation. He was convicted on both counts, and sentenced on the first to pay a fine of $500.00 and to imprisonment in the penitentiary for a term of 3 years and six months, and on the other count to pay a fine of $300 and to imprisonment for a term of six months. From this judgment he has appealed to this court.

The defendant insists that the jury that tried him was not legally constituted, because section 4 of an act of Congress, in relation to courts and judicial officers in the Territory of Utah, approved June 23d, 1874, was not followed in the selection of a jury.

28 The provisions of that section, in so far as they are material to this case, are, that annually, in the month of January, the clerk of the district court and the judge of probate of the county in which such court is to be held shall make a jury list, from which grand and petit jurors shall be drawn to serve until a new list shall be made, as in the section provided; that the clerk and the judge shall alternately select a name until two hundred names have been selected.

The section also provides that the names on the list shall be written on slips of paper and deposited in a box, presecibes the mode of drawing the regular grand and petit jurors for each term, and directs that the names so drawn shall not be returned to the box until a new list is made according to the manner prescribed in the section.

It is also provided that if during the term any additional jurors shall be necessary, they shall be drawn from the box by the United States marshal in open court.

The record shows that during the trial of the defendant,
29 and before the requisite number of jurors had been obtained,
all the names were drawn out of the box, and the list of two
hundred names was exhausted; that the district attorney, on the ground that the list provided for by statute was exhausted, then moved the court to issue a venire, in order that the requisite number might be obtained and the jury completed; and that thereupon a venire was issued to the marshal, directing him to summon from the body of the district fifty jurors. From these the jury was completed.

This was the only means by which the court could obtain a jury
to try the cause, for the clerk and probate judge are authorized to
make a list only in January. The statute does not provide for a
second list in any year, and to have stopped in the midst of the trial,
and to have issued a mandamus requiring the judge of probate and
the clerk to do an act which the law, either in terms or by fair con-
struction, did not require them to do would have been un-
30 lawful, arbitrary, and absurd; it would have resulted in
injecting into the case on trial a mandamus suit, and the
result would have been confusion and useless delay. It is also likely that the jurors which would have been selected by the probate judge would have disqualified themselves for sitting in a polygamy case by answering that they believed polygamy and unlawful cohabitation to be right, and the marshal is as certain as the clerk to select impartial jurymen; so that the real object in view, the selection of an impartial jury, was fully attained.

The court had two courses open before it: one was to stop the trial without the consent of the parties, and to continue the case, not only for the September term, but for the December term as well, and to the February term—five months at least—and that, too, contrary to the Constitution, which guarantees to every man charged with a crime a speedy and impartial trial.

It is unreasonable to hold that Congress, by the section in
31 question, intended to paralyze the action of the courts. If
the method provided by the statute under consideration fails,
it does not forbid the court from obtaining a jury by an open venire. If the common-law method is repealed or forbidden, it is wholly by construction and implication.

The laws of the United States expressly require each of the district courts of this Territory to hold four terms a year. If the construction insisted upon by the appellant be correct, the number of terms may be limited to two, or even one term, for the trial of polygamy cases.

There can be no court for the trial of criminal and other jury
cases without a jury. But if the method expressed in the statute be
exclusive, practically it may limit the terms to two, or even one.
If the position of appellant is right, the terms last year were limited
to two for polygamy and unlawful cohabitation cases, because the list
was not sufficient for the third term. And it appears that there
32 was no jury for any class of cases for the December term, as
no names at all were left in the box.

The court properly followed the statutory method of obtaining a jury until that method was exhausted; and it then was its duty to resort to the powers incident to it under the common law, and to obtain a jury according to that method. This view is supported by the authorities cited by the prosecution. In an opinion given in the case of the United States *vs.* Rose, (6 vol. Federal Reporter, page 136,) Swing, D. J., quoted the language of section 2 of the act of June 30th, 1879, which is, "And that all such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing at the time of each drawing the names of not less than 300 persons possessing the qualifications prescribed in section 800 of the Revised Statutes, which names shall have been placed therein by the clerk of such court, and a commissioner to be appointed by the judge thereof, which commis-
33 sioner shall be a citizen of good standing, residing in the district in which such court is held, and well known member of the principal political party in the district in which the court is held, opposing that to which the clerk may belong, the clerk and said commissioner each to place one name in said box alternately, without reference to party affiliations, until the whole number required shall be placed therein;" and also the language of section 804 of the Revised Statutes of the United States, the former law, which is: "When, from challenges or otherwise, there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court in which such deficiency of jurors happens, return jurymen from the bystanders sufficient to complete the panel," and said: "This section is not repealed in terms by the act of June 30th, 1879, nor do we think it is by implication. * * * Besides, if such were the construction, the inconveniences and delays to the court in the transaction of business would be in-
34 calculable." And after pointing out the delays and inconveniences, the court further said: "It certainly was not in contemplation of Congress that a construction working such inconveniences should be given to the law."

The language of the act of June 30, 1879, was more explicit and authorized a stronger inference of an intention to exclude any other method of obtaining a jury than would section 4 of the act of June 23d, 1874, on which the defendant relies. And the reasons for the former statute were similar to and quite as important as the reasons for the latter. In the case cited the statutory method had not been exhausted. In the case in hand it had; and if the objection had been sustained by the court in the former case the delays and inconveniences would not have been so great as would have followed the sustaining of the objections in the court below.

In United States *vs.* Mumford (Vol. 16, Federal Reporter, p. 165) the court made an order directing the marshal to summon jurors from the bystanders, and the defendant made the same objec-
35 tions as were made in United States *vs.* Rose, *supra*, and the court, making the same ruling, said: "The jury law of 1879 is a general law relating to all jurors, and has been held by Chief Justice Waite and Judge Bond, sitting together, not to con-

flict with section 804 of the Revised Statutes. * * * A literal adherance to the jury law of 1879 and a discardal of the unrepealed provisions of section 804 would work in frequent cases, and would have operated in the present case, a delay of proceedings equivalent to a paralyzing obstruction of the business of the court. Congress could not have meant to impose upon the proceedings of the courts the delays adverted to."

Stall *vs.* Harris (Chicago Legal News, Nov. 1, 1884) has been cited. This case arose under laws of State of Iowa, which required a jury list to be made by certain persons named for that purpose; and that all jurors should be drawn therefrom. The regular panel being exhausted, the district court refused to delay the trial in order
36 to fill the panel from the jury list, but directed it to be filled
by calling persons present in the court-room. To this the defendant, who was charged with a crime, excepted, and on appeal the supreme court of the State sustained the ruling of the district court, and said: "The court is, and must of necessity be, invested with a judicial discretion in this respect to the end that justice may be obtained and that unnecessary delays in the proceedings of courts will not occur." Also in the case of Mackey *vs.* The People (Vol. 2, Colorado R., p. 13) the court held that the statute which provided that grand jurors should be selected by the board of county commissioners did not exclude the common-law method; and if, after the regular panel has been discharged at a term of court, an exigency arises for another, a second panel may be selected and summoned by an open venire directed to the sheriff. To the same effect is the case of Stone *vs.* The People (3 Scammon, 326).

The laws of the United States have established district
37 courts in this Territory, and given them common-law juris-
diction (power to try cases). All the specific powers and means which it is necessary for courts to employ are not specified, but the authority to hold the court confers the necessary power. The general rule is that such power is implied as is necessary to carry into effect expressly given power. When, therefore, a court is given jurisdiction to try a jury case (which simply means the power to do so), and the authority to summon a jury is not mentioned, it is implied; for without a jury there cannot be a court for the trial of jury cases. If the jury is denied, the court is incomplete. When the method of obtaining a jury provided by the act of June 23d, 1874, was exhausted, if the court had no other authority, its power to try the appellant was gone for five months at least. Our view is, that when the mode of obtaining a jury according to the statute had failed, the power to use the ordinary means (the means to which the lower court did resort) was implied; it was inci-
38 dent to the authority to hold the court, and to try jury cases.

In the case of the United States *vs.* Hill *et al.* (Brockenbrough's Reports, vol. 1, p. 156) Marshall, C. J., said: "It has been justly observed that no act of Congress directs grand juries or defines their powers. By what authority, then, are they summoned, and whence do they derive their powers? The answer is, that the laws of the United States have erected courts which are invested with criminal jurisdiction. This jurisdiction they are bound to exercise, and it can only be exercised through the instrumentality of grand juries. They are, therefore, given by a necessary and indispensable implication. But how far is this implication necessary? The answer is obvious. Its necessity is co-extensive with that jurisdiction to which it is essential."

The laws of the United States give the district courts of the Territories common-law jurisdiction, and we are of the opinion that these courts have the authority to employ the common-law method of summoning a jury, when no other is furnished by statute,
39 or when the method so furnished has been exhausted, as in this case. To this method the court below resorted.

Section 93, Laws of Utah, 1884, p. 169, provides that "when jurisdiction is by this code or any other statute conferred on a court or judicial officer all the means necessary to carry it into effect are also given, and in the exercise of the jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code or statute."

If this section applies to a prosecution for *for* a breach of the law of the United States, it gave the court ample power to adopt the method, which was followed, after the statutory had been exhausted. Whether this statute applies, we do not deem it necessary to decide in this case. Having disposed of the only exception argued, it only remains to be added that no error has been found in the record sufficient to authorize a reversal of the judgment of the court below.

40 The sentence and judgment of the lower court is affirmed.

C. S. ZANE. *C. J.*

Twiss, A. J., concurs.
Emerson, J., expresses no opinion.

Endorsed: Filed 27 January, 1885. E. T. Sprague, clerk.

41 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judges of the supreme court of the Territory of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is before you in the supreme court of the Territory of Utah, in the matter of the prosecution by the United States against Rudger Clawson, being a prosecution on an indictment for polygamy and unlawful cohabitation, of which offenses the said Rudger Clawson was convicted, and the judgment affirmed by you, a manifest error hath appeared, to the great damage of the said Rudger Clawson, as by his complaint appears: We being willing that said error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United 42 States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the second Monday of October, A. D. 1884.

[SEAL.] E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

[Endorsed:] The United States *vs.* Rudger Clawson. Writ of error. Filed 26 January, 1885. E. T. Sprague, clerk.

43 The United States of America, Greeting, to the United States of America:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, 1885, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Utah, at Salt Lake City, in said Territory, and a copy of which writ is there left for you, wherein Rudger Clawson is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Chas. S. Zane, chief justice of the supreme court of Utah, this second Monday of October, A. D. 1884.

C. S. ZANE, *C. J.*

44 [Endorsed:] Rudger Clawson, pl'ff in error, *vs.* The United States, def't in error. Citation. I admit due service of a copy of the within citation, Jan'y 26, 1885. C. S. Varian, asst. U. S. dist. att'y for Utah. Filed 26 Jan'y, 1885. E. T. Sprague, clerk.

45 TERRITORY OF UTAH, } *ss:*
County of Salt Lake, }

I, E. T. Sprague, clerk of the supreme court of said Territory of Utah, in pursuance of the writ of error hereto attached, do herewith return said writ, the citation issued thereon, with proof of service endorsed, a transcript of the record and proceedings, assignment of errors, and opinion, all in and of said court in the cause in said writ entitled, to the Supreme Court of the United States, and I do hereby certify that said transcript of the record, the proceedings, assignment of errors, and opinion hereto attached is a true, full, correct, and complete copy of the several originals thereof on file or of record in my office.

Witness my hand and the seal of said supreme court of Utah Territory, this 28th day of January, A. D. 1885, at Salt Lake City, Utah.

[SEAL.]
E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

Endorsed on cover: Utah Territory supreme court. No. 1263. Rudger Clawson, plaintiff in error, *vs.* The United States. Filed February 5th, 1885.

114-477

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 1263.

RUDGER CLAWSON,
PLAINTIFF IN ERROR,
vs.
THE UNITED STATES,
DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

FRANKLIN S. RICHARDS,
WAYNE MacVEAGH,
For Plaintiff in Error.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1885.

Supreme Court of the United States.

October Term, 1884.

No. 1263.

RUDGER CLAWSON,
Plaintiff in Error,
vs.
THE UNITED STATES,
Defendant in Error

From Supreme Court of Utah.

Brief for Plaintiff in Error.

"Packing a jury," in the abstract, has always been regarded as a grave offence, striking at the very foundation of an honest administration of the criminal law; but it often seems to zealous prosecutors and partisans, on the bench as well as at the bar, to be justified in the particular case by their dislike of the accused, and their desire to see them punished. Of course they would prefer convictions without the disagreeable necessity of denying the defendant a proper panel of jurors, but the end seems to them so desirable as to justify the means, even when these means include keeping out of the jury-box the jurors duly summoned in order to allow the marshal to select and bring in jurors, about whose verdict there need be no doubt.

Some courts are still sufficiently old-fashioned as to regard an end so obtained, however desirable in itself, as incapable of being defended. In the case of Williams *vs.* Commonwealth, (10 Norris, 493,) the supreme court of Pennsylvania reversed a conviction thus secured, saying, among other things, that there "was good reason for not allowing a public prosecutor to come into court, challenge the array of jurors, and immediately force a prisoner to trial before those selected in the absence of all statutory safeguards against packing the jury. * * * Both the letter and spirit of the statutes secure to persons charged with crime a trial when a regular panel of jurors is in attendance. The next desideratum to the pure administration of justice is the giving satisfaction to the suitors that their causes have been fairly and impartially decided."

The learned judge then suggests that few district attorneys or judges could be found who would refuse to continue a trial until a regular jury could be obtained; and that the conviction even of a guilty man by a jury selected on the day of trial, under circumstances which usually surround such selection, would be "*an outrage done in the name of justice.*"

We do not fear that the doctrine thus announced will be questioned on general grounds. The effort will rather be to show that persons living in Utah and accused of polygamy have no rights which courts or juries are bound to respect, and that a proceeding which elsewhere would be "an outrage done in the name of justice," is there a virtuous effort to destroy a relic of barbarism.

The facts of this case, and the law, as we understand it, applicable to these facts, will be stated as briefly as possible, so as to present the grave issue involved in this controversy for the decision of this court.

STATEMENT OF FACTS.

At the April term, 1884, of the district court for the third judicial district of Utah Territory, the plaintiff in error was indicted in separate counts for polygamy and unlawful cohabitation, under sections one and three of the act of Congress approved March 22, 1882, entitled "An act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes." . The indictment is found on page one of the transcript. The joinder of these counts is authorized by section four of the same amendatory act, and for brevity said act is referred to in Utah, and herein, as the "Edmunds act."

The plaintiff in error had not been accused or held to answer when the grand jury was impanelled. This fact appears in the motion to quash, (Tr., p. 5,) and in the agreed statement of facts accompanying the motion. (Tr., p. 6.) At the time of the impanelling of the grand jury, it was not in anywise shown to the court that any person was held to abide its action on a charge of any of the offences named in section 5 of the Edmund's act, or that any presentation for such offences, or any of them, before said grand jury, was anticipated or contemplated.

The plaintiff in error, before plea, filed his motion to quash the indictment, on the ground that the grand jury which found the indictment was illegally constituted. (Tr., p. 4.) This motion was accompanied by an agreed statement of facts on which the motion was founded. (Tr., pp. 5, 6, and 7.) The motion was overruled, the plaintiff in error excepted, (Tr., p. 7,) and this ruling, and its affirmance by the supreme court of Utah, is the first alleged error in the case.

In impanelling a petit jury to try the case, the list of persons summoned on the venire, and also *all the remaining names of the two hundred persons on the general jury-list for the year*, became exhausted, and the court, against the objection and exception of the plaintiff in error, issued special open venires to the United States marshal, who selected and summoned persons from whom the jury was completed. The proceedings in impanelling the petit jury are shown on pages 7 to 15 of the Transcript.

The rulings and actions of the court in impanelling the petit jury, and the affirmance thereof by the supreme court of the Territory, and its decision as to the legality of the jury as constituted, are the alleged errors specified in the 2d, 3d, 4th, 5th, and 6th assignments of errors; but these five special assignments may be consolidated into one statement of error, that the petit jury was illegally constituted.

The questions involved in this case, therefore, are whether the grand and petit juries, as constituted, were legal juries, by which the plaintiff in error could be lawfully presented and tried.

The following sections of the statute provide for the selection of jurors and the impanelling of juries in Utah.

Section 4 of the act of Congress entitled "An act in relation to courts and judicial officers in the Territory of Utah," approved June 23d, 1874, so far as it relates to the present subject, reads:

> "That within sixty days after the passage of this act, and in the month of January annually thereafter, the clerk of the district court in each judicial district, and the judge of probate of the county in which the district court is next to be held, shall prepare a jury list from which grand and petit jurors shall be drawn, to serve in the district courts of such district until a new list shall be made as herein provided. Said clerk and probate judge shall alternately select the name of a male citizen of the United States who has resided in the district for the period of six months next preceding, and who can read and write in the English language; and, as selected, the name and residence of each shall be entered upon the list, until the same shall contain two hundred names, when the same shall be duly certified by such clerk

and probate judge, and the same shall be filed in the office of the clerk of such district court, and a duplicate copy shall be made and certified by such officers, and filed in the office of said probate judge. Whenever a grand or petit jury is to be drawn to serve at any term of a district court the judge of such district shall give public notice of the time and place of the drawing of such jury, which shall be at least twelve days before the commencement of such term; and on the day and at the place thus fixed the judge of such district shall hold an open session of his court, and shall preside at the drawing of such jury; and the clerk of such court shall write the name of each person on the jury lists returned and filed in his office upon a separate slip of paper, as nearly as practicable of the same size and form, and all such slips shall, by the clerk in open court, be placed in a covered box and thoroughly mixed and mingled; and thereupon the United States marshal, or his deputy, shall proceed to fairly draw by lot from said box such number of names as may have previously been directed by said judge; and if both a grand and petit jury are to be drawn, the grand jury shall be drawn first; and when the drawing shall have been concluded the clerk of the district court shall issue a venire to the marshal or his deputy, directing him to summon the persons so drawn, and the same shall be duly served on each of the persons so drawn at least seven days before the commencement of the term at which they are to serve; and the jurors so drawn and summoned shall constitute the regular grand and petit juries for the term for all cases. And the names thus drawn from the box by the clerk shall not be returned to or again placed in said box until a new jury list shall be made. If during any term of the district court any additional grand or petit jurors shall be necessary the same shall be drawn from said box by the United States marshal in open court; but if the attendance of those drawn cannot be obtained in a reasonable time other names may be drawn in the same manner."

Section 5 of the Edmunds act reads as follows:

"That in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, it shall be sufficient cause of challenge to any person drawn or summoned as a juryman or talesman, first, that he is or has been living in the practice of bigamy, polygamy, or unlawful cohabitation with more than one woman, or that he is or has been guilty of an offence punishable by either of the foregoing sections, or by section fifty-three hundred and fifty-two of the Revised Statutes of the United States, or the act of July first, eighteen hundred and sixty-two, entitled 'An act to punish and prevent the practice of polygamy in the Territories of the United States and other places, and disapproving and annulling certain acts of the legislative assembly of the Territory of Utah;' or, second, that he believes it right for a man to have more than one living and undivorced wife at the same time, or to live in the practice of cohabiting with more than one woman; and any person appearing or offered as a juror or talesman, and challenged on either of the foregoing grounds, may be questioned on his oath as to the existence of any such cause of challenge, and other evidence may be introduced bearing upon the question raised by such challenge; and this question shall be tried by the court. But as to the first ground of challenge before mentioned, the person challenged shall not be bound to answer if he shall say upon his oath that he declines on the ground that his answer may tend to criminate himself; and if he shall answer as to said first ground, his answer shall not be given in evidence in any criminal prosecution against him for any offence named in sections one or three of this act; but if he declines to answer on any ground, he shall be rejected as incompetent."

The Criminal Procedure act of Utah, approved February 22, 1878, provides:

"Sec. 117. * * * A grand jury must consist of fifteen eligible male citizens of the United States, selected, summoned, and impanelled as provided by law, twelve of whom may constitute a quorum to do business. Every male citizen of the United States is an eligible juror who is—

"1. Over the age of twenty-one years; and

"2. Who can read and write the English language; and

"3. Who resides in and has resided in the judicial district in which he is called upon to serve six months next preceding the time he is selected, by the probate judge and clerk of the district court, to serve as a juror, as provided by law; and

"4. Who is a tax-payer in this Territory; and

"5. Who is of a reputed sound mind and discretion, and who is not so disabled in body as to be unable to serve; and

"6. Who has not been convicted of a felony; and

"7. Who is not an officer or soldier of the United States, or a person subject to their military control, unless his home and place of residence was in this Territory at the time of engaging in such service, or who has not served on grand or petit juries within the term of two years next preceding.

"Section 118. The people, or a person held to answer a charge for a public offence, may challenge the panel of a grand jury or an individual juror.

"Section 119. A challenge to the panel may be interposed for one or more of the following causes only:

"1. That the requisite number of ballots was not drawn from the jury box;

"2. The notice of the drawing of the grand jury was not given in the manner provided by law;

"3. That the drawing was not had in presence of the officers designated by law.

"Section 120. A challenge to an individual grand juror may be interposed for one or more of the following causes only ·

"1. That he is not an eligible juror as provided by law;

"2. That he is prosecutor upon a charge against the defendant;

"3. That he is a witness on the part of the prosecution, and has been served with process or bound by an undertaking as such;

"4. That he has formed or expressed an unqualified opinion or belief that the defendant is guilty or not guilty of the offence charged; but a hypothetical opinion, founded on hearsay or information supposed to be true, unaccompanied with malice or ill-will, shall not disqualify a juror or be a cause of challenge."

By sections 123, 124, and 125 of this act it is, in substance, provided that a person *held to answer* can take no advantage of any objection to the panel or to an individual grand juror except by challenge, and that if the challenge to the panel or individual is sustained it only prevents the panel or the individual, as the case may be, from acting on the case of the party challenging.

Section 185 of the same act preserves the rights of a person *not held*, and provides:

> "Section 185. The indictment must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases:
>
> "1. Where it is not found endorsed and presented as provided by this act; * * *
>
> "4. When the defendant had not been held to answer before the finding of the indictment, on any ground which would have been good for challenge either to the panel or to any individual grand juror."

BRIEF AND ARGUMENT.

The first specification of error is:

> "The district court erred in overruling appellant's [plaintiff in error] motion to set aside the indictment, and the supreme court of Utah Territory erred in affirming the judgment and ruling of the district court in this respect."

The following considerations are submitted as to this assignment of error:

1. Section 4 of the act of Congress of June 23d, 1874, provides that the regular jurors for the term shall be drawn at least twelve days before the commencement of the term, at

an open session of the court, by the U. S. marshal, and after a notice of the time and place of drawing. The jurors must be summoned at least seven days before the term, "*and the jurors so drawn and summoned shall constitute the regular grand and petit juries for the term for all cases.*"

The notice, time, place, and manner of drawing are mandatory, and the entire public is made a party to the proceeding.

In pursuance of this, the Utah law (Sec. 117, *supra*) requires that the grand juries shall be "selected, sumnoned, and impanelled as provided by law." Section 119 provides that the challenge to the panel may be for the omission to draw the requisite number of ballots, or the omission of the notice, or the absence of the proper officers at the drawing. The challengé to the individual juror may be that he is not an eligible juror as provided by law. Here the word "eligible" undoubtedly means *then eligible*, and includes the manner of his selection. A juror at the time of making the general list might be eligible to go on that list, because, up to that stage of the selection, eligibility depends only on his personal qualifications. At the time of the drawing from the general list he may be eligible for the same reasons, while at the time of impanelling *the choice* is not from the general jury list, but from a number drawn from that list and summoned as required by law, and *at this time the eligibility depends not only on personal qualifications, but also on the regularity of selection.*

These careful provisions for the public selection of jurors and for the manner of summoning them clearly show that a resort to the box for additional names cannot be had as a matter of discretion, and that the special list for the term must be legally exhausted before resorting to the general list. The words of section 4 of the act of Congress are that further names may be drawn when "any additional grand or petit jurors shall be necessary."

There was no necessity except that caused by unlawfully rejecting qualified jurors, and therefore no authority for resorting to the general list.

The statement of facts accompanying the motion to quash shows that of the thirty names drawn from which to select a grand jury of fifteen twenty-five had all the qualifications required by law, unless the fifteen rejected were disqualified by their answers to the special questions propounded by the district attorney relating to their belief in the doctrines of the Mormon Church set out in the statement, and the fifteen so answering were rejected under section 5 of the Edmunds act, *supra*, and this rejection was the occasion for a resort to the general list, from which five persons were put on the jury.

The Edmunds act applies to all the Territories and to all places over which the United States have jurisdiction. Section 5 does not make the challenge provided for applicable to all jurors in the Territories, but only to the special case of "*a prosecution for bigamy, polygamy, or unlawful cohabitation under any statute of the United States.*" Is the impanelling of a grand jury a prosecution, and in this case was it under any statute of the United States? Bouvier, in his Law Dictionary, vol. 2, p. 389, defines a criminal prosecution as "the means adopted to bring a supposed offender to justice and punishment by due course of law. * * * In this country," he says, "the modes are by indictment, by presentment, by information, and by complaint."

In a case like this, where the accused had not been held to answer, it would seem that *the prosecution could not begin until after the grand jury was impanelled*, and that the finding of the indictment would be the commencement of the prosecution.

The grand jury that found this indictment was the regular grand jury for the district, whose duty it was to inquire into all offences, as well under the laws of the Territory as under the laws of the United States, and *the impanelling of the grand jury was no more "a prosecution for polygamy" than it was a prosecution for burglary*, because the jury was as likely to be called upon to investigate the one class of offences as the other. It was a proceeding had prior to the commencement of any prosecution, *and was not "under any statute of the United States*," for the impanelling of grand juries is regulated entirely by the territorial statute, and there is no law of Congress on the subject which applies to the Territories.

Clinton *vs.* Englebrecht, 13 Wall., 446.
Reynolds *vs.* United States, 98 U. S., 154.

Section 5 of the Edmunds act, *supra*, clearly shows that it is only applicable to petit jurors, and the construction contended for by the prosecution changes its terms so as to make them applicable to all jurors in the Territories, and in effect creates a new cause of challenge to all jurors, which was clearly not the intention of Congress, because the act expressly limits the challenge to jurors in prosecutions for the special offences named. But if the section is applicable to grand jurors, the terms of the law were not complied with, for none of the jurors who were retained on the panel were interrogated as to their belief in the rightfulness of cohabiting with more than one woman. If the jurors of the one class were disqualified because they believed it right to have more than one wife, those of the other class would also be disqualified by the same section if they believed it to be right for a man to cohabit with more than one woman, and it should have been ascertained whether or not there were any such persons on the jury. It would be unreasonable to suppose Congress intended that members of one of these classes should be singled out and packed into a jury box to indict members of the other class.

To say that the fifteen persons who composed the grand jury were all personally qualified is to assume the whole question. Five of them were not qualified. They belonged to a class of persons that only became qualified when another class was legally exhausted. If one or more of the first thirty had been irregularly excluded, and their places filled by others of the same class, it would perhaps be a good jury, for it would be wholly constituted of qualified persons, and the irregularity would be but little more than a change in the order of the names on a list of jurors, all of whom were qualified. It is not necessary to consider whether the objection to the panel, or the objection to the individual jurors, was the more proper. The panel as made up consisted of ten jurors who are supposed to be lawful and five unlawful jurors, and therefore it was not a grand jury at all, and the challenge to the panel seems correct. On the other hand, had the objection to the five individuals been sustained, it would have left only ten persons, and hence there was no grand jury.

II.

The second assignment of error is, in substance, that *the petit jury was not lawfully constituted.* This includes in a general expression all the special assignments in the Transcript, except the first, and *the question involved is the right of the court to summon trial jurors on open venire.*

The right to so summon a jury must be found, if it exists at all, in an implied grant of authority to be used as a necessary means of exercising powers and jurisdictions granted, for there is no statute, either Congressional or Territorial, which in terms confers the power on the court to issue an open venire, or the authority on the marshal to summon jurors under it.

At the first session of the legislative assembly of the Territory of Utah, held in 1852, an act was passed providing for the selection and summoning of jurors. In 1859 another law was passed providing for the selection and summoning of jurors for district courts, *which constituted a complete system, and provided for every possible contingency, leaving no room or cause for an open venire.*

In 1874 Congress enacted the following jury law for the Territory, to wit:

"That within sixty days after the passage of this act, and in the month of January annually thereafter, the clerk of the district court in each judicial district, and the judge of probate of the county in which the district court is next to be held, shall prepare a jury list from which grand and petit jurors shall be drawn, to serve in the district courts of such district, until a new list shall be made, as herein provided. Said clerk and probate judge shall alternately select the name of a male citizen of the United States, who has resided in the district for the period of six months next preceding, and who can read and write in the English language; and, as selected, the name and residence of each shall be entered upon the list, until the same shall contain two hundred names, when the same shall be duly certified by such clerk and probate judge, and the same shall be filed in the office of the clerk of such district court, and a duplicate copy shall be made and certified by such officers, and filed in the office of said probate judge. Whenever a grand or petit jury is to be drawn to serve at any term of a district court, the judge of such district shall give public notice of the time and place of the drawing of such jury, which shall be at least twelve days before the commencement of such term; and on the day and at the place thus fixed the judge of such district shall hold an open session of his court and shall preside at the drawing of such jury, and the clerk of such court shall write the name of each person on the jury lists returned and filed in his office upon a separate slip of paper, as nearly as practicable of the same size and form, and all such slips shall, by the clerk in open court, be placed in a covered box, and thoroughly mixed and mingled; and thereupon the United States marshal, or his deputy, shall proceed to fairly draw by lot from said box such number of names as may have previously been directed by said judge; and if both a grand and petit jury are to be drawn, the grand jury shall be drawn first, and when the drawing shall have been concluded the clerk of the district court shall issue a venire to the marshal or his deputy directing him to summon the persons so drawn, and the same shall be duly served on each of the persons so drawn at least seven days before the commencement of the term at which they are to serve, and the jurors so drawn and summoned shall constitute the regular grand and petit juries for the term for all cases; and the names thus drawn from the box by the clerk shall not be returned to or again placed in said box until a new jury list shall be made. *If, during any term of the district court, any additional grand or petit jurors shall be necessary, the same shall be drawn from said box by the United States marshal in open court; but if the attendance of those drawn cannot be obtained in a reasonable time, other names may be drawn in the same manner.*"

It is historical in Utah that, prior to the enactment of the section last quoted, complaint was made by members of the minority party there that the jury lists were all made by officers who came from the majority party, and that the minority was not properly represented. It was to remedy this supposed evil, and to secure equality of representation on juries, that the act of Congress above quoted was passed. It was believed that this could not be done with an open venire in the hands of either side, and that it must be excluded. In order to do this, a jury list of 200 was provided for, instead of 50, as the law then stood, and the larger number of 200 was deemed ample for four terms. That a contingency would arise by which a large part of the jurors would be disqualified was not contemplated, and that it has arisen cannot change the construction of the law, or the motives that actuated it, or the purposes sought by means of it. The provisions of the act, taken by themselves and in connection with its history, are sufficient to show, without express words of exclusion, that the act is a complete provision, and was intended by Congress to be the sole method of getting jurors in the district courts. It not only prescribes the qualifications of jurors, but explicitly directs how and by whom they shall be selected, as well as how they shall be drawn and summoned. *This legislation is undoubtedly exclusive and covers the entire ground.* So far from leaving any implied authority in the court to select jurors, or procure them by open venire, the statute clearly negatives that right by giving the selection of them and the making of the jury list to the clerk of the court and the probate judge. After the selection of jurors is made and the names are put into the jury box and thoroughly mixed and mingled, the judge directs the number of names to be drawn from the box, and the law declares that "*the jurors so drawn and summoned shall constitute the regular grand and petit juries for the term for all cases.*" *There is no exception to the rule. All jurors must be selected and drawn in this manner.*

The supreme court of Maine decided a question very similar to this in the case of the State *vs.* Symond, (36 Maine, 131,) where there was a deficiency in the number of grand jurors, and the court issued an open venire to fill the panel. The supreme court said: "The legislature has required that grand juries shall be selected and returned in the same manner as juries for trial; and, in respect to the latter, has authorized the court to complete the panel, when a sufficient number of the jurors duly drawn and summoned cannot be obtained for the trial of a cause, by causing jurors to be returned from the bystanders, or from the county at large; and in term time, to issue venires for as many as may be wanted. *But in regard to the former it has conferred no power upon the court to complete a deficient panel, by causing jurors to be returned de talibus circumstantibus, or in any other manner.* The whole subject is within the control of the legislature; they may give to the court the same power as to both juries, to complete a deficient panel or withhold it; but *unless it be given, it cannot be lawfully exercised.*"

So in this case, *Congress or the Territorial legislature has the right to confer the power on the courts to supply an exhausted panel by open venire or otherwise, or to withhold such power; it has been withheld, and until expressly conferred the courts cannot legally exercise it.*

In the case of Wright *vs.* Stuart, (5 Blackf., 120,) the supreme court of Indiana, in considering the power of the circuit court to supply a deficiency in the jury panel by an open venire, said:

> "The board of commissioners had failed to have any jurors selected for the second week of the term, during which week this trial took place; on the calling of the cause, a jury was summoned and impanelled by the order of the court, and the defendant, under these circumstances, challenged the array. This challenge ought to have been sustained. According to the statute, the jurors for the second week should have been selected by the board of commissioners, and as there had been no such selection there could be no unobjectionable jury impanelled during that week. The defendant might, perhaps, have waived the objection, but he did not do so. He made the challenge at the proper time and the array should have been quashed."

The supreme court of Mississippi, in the case of Leathers *vs.* The State, (4 Cush., 76,) declared that *the directions of* *the law as to the drawing of jurors were designed for wise purposes, and must not be violated in any respect.* And then the court said: "*They are all intended as guards to protect the liberty of the citizen, and should be held to constitute an important part of the right of trial by jury.*"

But it is contended by the prosecution that the court has an implied power to issue an open venire when it becomes necessary to have a jury and the means provided by statute have failed to provide one, and the decision of Chief-Justice Marshall in the case of The United States *vs.* Hill *et al.* (1 Brockenbrough, 156) is relied on as authority for this proposition; but in that case no statutory provision whatever had been made for a jury, and the chief-justice decided that as the court had criminal jurisdiction which could only be exercised through the instrumentality of juries there was a necessary and indispensable implication of authority in the court to summon a jury in the absence of legislation on the subject. *This decision plainly imports that if there had been a statutory mode it must have been followed.*

The case of Stone *vs.* The People (2 Scammon, 326) is also cited, where it was held that there was a common-law power to summon talesmen in cases not within the provisions of the statute on the subject, but that case differs from this one in many particulars. Illinois had expressly adopted the common law as it existed prior to the 4th of James II, with some noted exceptions. It was held that the law for selecting jurors by the county commissioners was only *directory.* The court was doubtful as to whether the statute permitting the venire when the panel was "exhausted by challenges or otherwise" covered the case, and placed the decision on the ground that the provision for such venire was not exclusive and did not take away the common-law power; but the court said that "had these courts no common-law power the want of a grant of such power by statute would then be conclusive against its exercise." *We deny that there ever was any common law in Utah on the subject of the selection of jurors, or any custom or usage resting on common-law authority or principles, and say that from the time of the first legal organization of the Territory and the adoption of jury trials the subject has been governed by statute regulations.* But if there ever was any such common-law power it was, by the acts of the legislature before referred to, entirely taken away, and since 1859, at least, the law on this subject has been fixed wholly by statute.

There was no power in the court to use an open venire by reason of an implied grant of power incident to the exercise of its jurisdiction. An implied authority can only exist when there are no means expressly authorized, and all the reasons for holding that there is no common-law power apply with equal force to exclude an implied grant of authority.

The statute provided for talesmen to be taken from the jury box for all foreseen contingencies, and did not intend to leave anything to implication. The resort to the open venire here is on a contingency more remote than in any case cited. It was resorted to not only after a failure of the means provided for the regular panel, but also after a failure of the means provided by statute for talesmen.

In the case at bar if there was any implied power to furnish additional names for jurors it would reasonably rest in the clerk of the district court and the probate judge, whose duty it is under the statute to make the jury list; but if they had added to the original list of two hundred the names of person summoned by the marshal on the open venire, would there be any doubt as to the illegality of the list? Certainly not.

In view of the position of the court below that notwithstanding the statutes already quoted, and, indeed, without regard to them, an implied power exists in the court to supplement an exhausted panel of jurors by issuing an open venire, it is significant that the legislatures of all the States and the law-making power of every Territory whose laws have been consulted by counsel have by formal enactment made provisions for the obtaining of jurors when regular lists have been exhausted.

See Alabama Rev. Code, sec. 4091 ; Arkansas Rev. Stat., sec. 3699 ; California Codes and Stat., sec. 227 ; Colorado Gen'l Laws, p. 541 ; Connecticut Gen'l Stat., 1875, p. 434 ; Delaware Laws, 1874, p. 660 ; Florida, McClellon's Dig., 1881, p. 625 ; Georgia Code, 1882, sec. 3937 , Illinois Rev. Stat., 1880, p. 650 ; Indiana Rev. Stat., 1881, secs. 532 and 1795 ; Iowa, McClain's Annot. Stat., p. 1085 ; Kansas Comp. Laws, 1879, sec. 2988 ; Kentucky Gen. Stat., 1881, p. 576 ; Louisiana, Voorhees' Rev. Stat., 1876 ; Maine Rev. Stat., 1883, p. 705 ; Maryland Rev. Code, 1878, p. 561 ; Massachusetts Pub. Stat., 1882, p. 995 ; Michigan, Howell's Annot. Stat., 1905 ; Minnesota Statutes, 1878, p. 785 ; Mississippi Rev. Code, 1880, p. 469 ; Missouri Gen. Stat., 1865, 600 ; Nebraska Gen'l Stat., p. 643 ; Nevada Comp. Laws, sec. 1055 ; New Hampshire Gen'l Laws, 1878, p. 596 ; New Jersey Statutes, p. 281 ; New York Pen. Code, sec. 81 ; North Carolina, Battle's Rev., 800 ; Ohio Rev. Stat., 1884 ; Oregon Gen'l Laws, 142, 294 ; Pennsylvania, Purd. Dig., 385 ; Rhode Island Pub. Stat., 1882, p. 540 ; South Carolina Gen. Stat., 1882, sec. 255 ; Tennessee Stat., sec. 4030 ; Texas Rev. Stat., 1879, art. 3096 ; Vermont Rev. Laws, 1880, sec. 895 ; Virginia Code, 1873, 1061 ; West Virginia Code, *Id.* ———; Wisconsin Rev. Stat., 1878, p. 704 ; Arizona Ter. Comp. Laws, 1877, sec. 2424 ; Dakota Ter. Codes, p. 352 ; Idaho Ter. Rev. Laws, 1874–'5, p. 708 ; Montana Rev. Stat., 1879, 571 ; New Mexico Comp. Laws, 1865, p. 510 ;

Washington Ter. Code, 1881, p. 67; Wyoming Ter. Comp. Laws, 1876.

Almost all of these statutes give power to the court to have talesmen called from the bystanders or summoned from the body of the county. Louisiana does not recognize an open venire, but provides that when one venire is not sufficient another may be drawn "in due form." Ohio permits the summoning of talesmen, but not from in or about the court-house. The State of Nevada and the Territory of Montana have a provision in their laws similar to that in the Utah statute of 1874 requiring that names of additional jurors needed shall be *taken from the box* and not recognizing the validity of an open venire.

If there is anything to be gathered from this universality of special enactment it is that there was a universality of need that prompted it. And whatever differences there may be between the statutes of the various States and Territories they are to be respected as indicating different demands of the sections in or for which they were enacted. If it was part of the implied power of the courts of the several States and Territories to summon talesmen or to issue open venires it is singular that the various legislatures should have so uniformly found it desirable to echo this power in enactments. And if in such jurisdictions as Utah, where the right to summon talesmen by open venire is denied because another mode of obtaining them is provided, the method of open venire is still to be applied, it is submitted that not only will differences in the wording of statutory enactments fail of respect, but the statutes themselves will be idle, and worse than idle—encumbrances on the statute-books.

But authority is not lacking for the position that where a statute, such as that of 1874 in Utah, provides a certain mode for obtaining additional jurymen, there is no power to be invoked outside of the statute. Besides the authorities already cited, the case of Mosseau *vs.* Veedey (2 Oregon, 113) is in point. In that case the lower court, having discharged the regular petit jury for the term, had sent into the body of the county for more jurymen, and it was held by the reviewing court that this was an act beyond its power. The statutes of Oregon provided that where the jury failed to attend, or where there were not enough jurymen present for a jury, the sheriff could summon talesmen from the bystanders or from the county. But the statutes as to talesmen were not to be extended to the case where the jury had been discharged. The court rested its concession of the right to complete a jury on the one hand, and its denial of the right to bring in a new jury by open venire on the other, strictly *upon the statute.* Said the court: "*We know of no other authority, and hence must hold that it was error in the circuit court to call such a jury or force defendant to trial.*"

Now, it must be apparent that the logic of the prosecutor's position in the case at bar, that an implied power exists in every court to obtain by open venire a jury for the trial of its causes, would seem to require that such open venire be upheld, whether issued to bring in an entirely new jury or to complete a partially filled one. The only theory upon which, even from the prosecutor's standpoint, the right of a court, independent of statute, to bring in a jury by summary process, is to be supported, is that the right and duty to hold a court implies the right to have a jury. Whether, when a particular defendant is to be tried, a jury should be lacking, through the discharge of a previous one or through failure of jurymen to respond to the sheriff's writ, does not affect the court's duty, whatever it be, to have a jury for the trial of its causes. And yet we have seen that in Pennsylvania, in Indiana, and in Oregon such right was refused because not expressly given by the statute, which undertook to say when and how jurymen should be obtained by the court.

In Reed *vs.* State of Ohio, (15 Ohio, 217,) where the regular jury had been discharged and the trial judge had ordered a jury to be constituted from the bystanders, the supreme court upheld the jury as legal upon a construction of the State statute as to jurors. Had there not been a statute authorizing the jury, no implied power would have saved it.

In State *vs.* Williams, (5 Porter, 130,) it was held that the summoning of a grand jury in a way not contemplated by a statute of the State which prescribed the manner in which they should be summoned was void, and would be ground for reversal of judgment. It is there also very clearly intimated in the same connection that the recognized power of the State court to direct the sheriff to summon petit jurors by an open venire was to be rested on the provisions of a statute of a State. A statute of 1826 provided that, where jurors were not drawn and summoned in the manner prescribed by law, or should not attend, the court could direct the sheriff to summon a jury *instanter*. Though the point does not necessarily arise in the case, yet the refusal of the court to recognize the validity of a grand jury not constituted according to the State statute, and the recognition of a petit jury so constituted, plainly justifies the inference that any other source of right is to be considered as superseded by the statutory provisions.

It is to be noted that all the decisions which have been found that in any degree favor the position of the prosecutor are rested upon statutes unlike the statute of 1874 as to Utah, and which permit the summoning of talesmen by open venire. Such is the case as to those cited in the opinion of the court below, as found in the Transcript.

In United States *vs.* Rose, (6 Fed. Rep., 136,) referred to at length by Mr. Chief-Justice Zane, the district judge for the southern district of Ohio, rested the right to summon talesmen from the bystanders upon the provisions of sec. 804 of the Revised Statutes as unrepealed by the act of June 30, 1879.

The existence of a prior statute law unrepealed, and not the existence of an implied authority, was the basis, and the only basis, for the validity of a jury summoned from bystanders.

So in United States *vs.* Mumford, (16 Fed. Rep., 165.)

Under the act of 1879 there was no provision that when the persons whose names were drawn from the box could not be conveniently summoned others could be drawn from the box in their place. The argument *ab inconvenienti* was, therefore, of great weight in leading the courts in those cases to the conclusion that Congress, by the enactment of the statute of 1879, did not intend the repeal of the provisions as to summoning of bystanders, found in section 804 of the Revised Statutes. The act of Congress relating to Utah, however, distinctly provides that when the attendance of those drawn from the box cannot be obtained in a reasonable time other names can be drawn in the same manner. With this provision in the statute, it is pushing the argument *ab inconvenienti* farther than it has ever been extended before to hold that, although no statute allows it, yet an implied power exists to issue an open venire, because the courts otherwise might have to adjourn to some future day, an event not supposed to have been contemplated by the law-makers.

It need only be said that this view would constitute the judiciary the law-making, in addition to the law-declaring, power. It would render uncertain the right of either party to insist upon a compliance with the established laws, for any judge could deny a continuance and force a trial in all cases where the forms of law happened to be palpably violated, by merely holding that delays were not contemplated by the law-makers, and therefore an implied power to prevent them in any way they deemed proper belonged to the judges on all occasions.

It has been said that the accused is entitled to a speedy trial, and that the court must be impliedly given the authority to grant it.

A speedy trial does not mean a trial within any particular time, but a trial within a reasonable time, having reference to the state of the law, the means of trial provided, the times of the sessions of the courts, the opportunities of the parties to get witnesses, and the extent of other court business of equal importance, or having preference.

Cooley's Const. Lim., p. 312.

There is no court for the trial of a criminal case until a legal jury can be obtained, and until this is done the time for a speedy trial has not arrived. The judge of the court may be sick, or the office vacant, or by some other unlooked-for contingency the term may not be held, and this would not authorize the holding of an irregular court.

Continuances are provided for in the criminal procedure act.

Laws of Utah, 1878, p. 107.

There was no necessity for an open venire for the general business of the term. There were sufficient regular qualified jurors in attendance for all general business, and only this case would have had to be continued. The accused was not demanding trial, and that an immediate trial could not be had was no ground of complaint by the prosecution; the defendant alone was entitled to avail himself of it, which he did not do, preferring to have his case continued till he could be tried by a legal jury.

The questions involved in this case are of very grave importance, not only to the plaintiff in error, but to every citizen of Utah, because the principles involved lie at the very foundation of the sacred right of trial by jury. Under the present statute the judge of the court determines how many names shall be drawn for each jury at each term, and the law says that the names so drawn shall not be returned to the jury box; by drawing an unnecessarily large number each time, the jury list may be exhausted at a very early period in the year, and the court, by issuing open venires, without statutory authority and contrary to the legislative intent, may *revolutionize the jury system of the Territory and open the door for those abuses of this very dangerous power, which followed its exercise in England, and gave rise to frequent and grievous complaints about packed juries and illegal convictions.* The officer who goes forth armed with an open venire for a panel of jurors, in a particular case, has it in his power oftentimes to make such a selection as will either convict or acquit the defendant, as he may choose, and in a Territory where the marshal himself may be imported from a distant State, and his deputies may be neither the most conscientious nor responsible of men, there would seem to be some danger in conferring upon them this important discretion and almost unlimited power. *The open venire is a process that has never been favored by our legislatures nor encouraged by our judiciary until now, and where resorted to at all it has only been to provide talesmen for filling occasional deficiencies in the regular panel, and not as a means of obtaining eleven out of twelve jurymen, as in this case.*

With the confident assurance that these grave questions will receive the careful consideration to which they are entitled, and that the decision of this honorable court will fully vindicate and sustain the constitutional right of the plaintiff to be tried by a legal and impartial jury of his peers, the case is most respectfully submitted.

FRANKLIN S. RICHARDS,
WAYNE MacVEAGH,
for Plaintiff in Error.

114-477

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In the Supreme Court of the United States

October Term, 1884.

Clawson
v.
The United States.
No. 1263.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States

OCTOBER TERM, 1884.

CLAWSON
v.
THE UNITED STATES.
No. 1263.

BRIEF FOR THE UNITED STATES.

Clawson was indicted for *polygamy* at April term, 1884, of a district court of Utah, and having been convicted and sentenced at October term, appealed to the supreme court of the Territory, where, during the past January, the judgment below was affirmed; and thereupon he again appealed to this court.

In the district court sundry exceptions were taken to the proceedings. Of these exceptions only two are now relied upon by the assignments of error, viz: The methods by which the grand jury and the petit jury were constituted.

The statutory provisions bearing upon these matters in general are given in the brief of the learned counsel for the appellant, at pp. 4, &c.

1. As regards the impanneling of the grand jury the facts stated in the record are briefly as follows:

The annual jury list of "*two hundred*" for 1884 was duly made, and from this, in March, 1884, were drawn thirty names from which to impannel a grand jury for April term. At that time, during such impanneling, a number of those drawn were excepted to and excluded for *belief in a right to have more than one undivorced wife living at the same time* (p. 6, top), so that for this reason and others (unimportant here), only ten of the fifteen necessary for a grand jury in Utah were obtained from those so drawn as above; and thereupon ten additional names were drawn from the list of "*two hundred*," and out of these the additional five were obtained.

[The exception at this point was to the allowance of the above-stated *challenges*, inasmuch as the polygamy act of Congress of 1882 confines the allowance of challenges because of a belief in a right to have several wives, to "*any prosecution* for bigamy," &c. (brief for appellant, p. 5), it being contended now that the impannelling of a grand jury is not within the meaning of such act, a part of the "prosecution."]

2. In the matter of impanneling the petit jury the facts are as follows:

The defendant was put upon trial twice during the term, the first jury having failed to agree. In impanneling the second jury the whole annual jury list of "*two hundred*" was exhausted, under challenges like the above, and thereupon the court (after objection by the appellant) ordered an "open venire" to issue (p. 8), and after that had been exhausted, a second and a third (p. 12, bottom) of the same sort. The petit jury was composed of persons from each of these venires.

[The exception here is, that the act of Congress of 1874 (appellant's brief, p. 4) authorizes no jury in such case unless its members be drawn from the list of "*two hundred*" therein provided.

1. As to the grand jury:

(*a*.) Allowing, for the sake of argument, that the challenges given by the act of 1874 concern the petit jury only, it seems that nevertheless a grand jury must be composed of "*good and lawful* men," and also that no *man* can be such (in the eye of any law that uses or implies those words in the venire: Appendix to 4th Blackstone) who believes it *right to commit crime;* for instance, *right to commit* "*polygamy.*" It must be entirely inadmissible to impute to Congress an intention to strip courts of the protection of a fundamental common law principle like this, which is a very *article of standing or falling justice.*

(*b*.) But it is also submitted that the word "prosecution" in the act of 1874, covers the whole procedure, from the impanneling of the grand jury to that of the petit jury. By the manifest reason of the thing the impanneling of the grand jury made a special opportunity for the exercise of the functions of the prosecuting officer, and put him upon the *qui vive.* The drama opened there.

If, as at common law, a *special* prosecuting attorney had then been under employment there would be no doubt. How does the circumstance that the prosecuting attorney in question was a *general* one make any difference to the purpose now under consideration? *Fervet opus!* from the time that the selection of grand jurors begins, and that *opus* is "prosecution," as to everybody who turns out afterwards to be prosecuted thereby. The expression "talesman" in the same section does not confine the "challenge" there spoken of to the petit jury, but in connection with the word "juryman," just before, only makes a case for applying the rule, *singula singulis*.

2 As to the petit jury.

At common law the venire for petit jurors was a *judicial* writ, which issued *toties quoties* from courts as a necessary sequel of every issue *to the country* by parties to either civil or criminal pleading. A monument of this is the judgments in courts of appeal directing "*venires de novo*" to be awarded. The record given in the appendix to 4th Blackstone is the voice of the law to that effect for criminal matters. See also Hawkins 2, 571. The power of the court to issue a *tales* when necessary was therefore mere matter of course. It follows moreover that so far as statutes have not expressly, or by necessary inference, taken away from a court this power to summon talesmen it continues.

No doubt the act of 1874 gives *the rule* to the extent that it gives *any rule*. It goes upon an evident presumption that the annual list of "*two hundred*" would, in fact, supply the needs of the court. But it contains no anticipation of or provision for a case in which that list might fall short of supplying what was needed. It is submitted that there is nothing upon the face of the statute to indicate that Congress intended that the list of *two hundred* should be an absolute *sine qua non* for the execution of justice (both civil and criminal) to the extent contended for by the appellant. There is no doubt a mandate for its use, but in view of the universally acknowledged duty owed by this society to its own current peace and justice, very express words would be needed to *improve* (?) such a mandate into a prohibition upon former methods, even where the new machinery had broken down. No such intention can be implied without an absolute necessity. An argument which results in that seems thereby to end in *reductio ad absurdum.*

With these remarks upon points made in the brief for the appellant I wish to say that upon the general question the Government relies greatly upon the opinion of the learned court below, given in the record.

S. F. PHILLIPS,
Solicitor-General.